Editor's note: Reconsideration granted; decision vacated -- See Myrtle Jaycox, Serafina Anelon, and Hilma Eakon, 64 IBLA 97 (May 17, 1982)

MYRTLE JAYCOX

IBLA 75-473 Decided November 10, 1975

Appeal from decision of the Fairbanks District Office, Bureau of Land Management, rejecting Native allotment application F-18855 insofar as it relates to parcel B.

Affirmed.

1. Alaska: Native Allotments

> Mere seasonal use of land for berry picking, when the land is used for berry picking by others, is not the substantially continuous use and occupancy to the potential exclusion of others contemplated by the regulations. A Native allotment application which asserts seasonal use for berry picking while the land is used by others must be rejected.

APPEARANCES: Donald E. Clocksin, Esq., Alaska Legal Services Corp., for appellant.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

This is an appeal by Myrtle Jaycox arising from the rejection of her Native allotment application covering the "B" parcel embracing 80 acres. The decision was rendered by the Fairbanks District Office, Bureau of Land Management (BLM), on March 27, 1975.

The facts are not disputed. Appellant was born on October 12, 1945. Her Native allotment application, filed in June 1971, alleged initiation of use and occupancy of three separate parcels on June 28, 1961 (when she was 15 years and 8 months of age), and actual residence on the three separate parcels from June 20 to December 21 of each year thereafter. She stated that she uses the separate parcels for hunting and berry picking albeit she never erected any improvements on any of the parcels. Her application carried the notation as follows:

> These tracts of land has been passed down from generation to generation. I have used the above mentioned since 1961 or possibly earlier during my childhood years.
>
> I am much dependent on the subsistence provided by these tracts of land I have applied for.

A field report of May 1973 indicates that access to parcel "B" is by a foot path from the Village of Kiana. The field examiner stated he had conversations with other people in the village, including the appellant's mother and aunt, and that all parties substantiated appellant's statements and further stated that the entire community used the area to pick berries.

The decision below, noting that the parcel is located near the village and is readily accessible to and used by other villagers for berry picking, held that appellant's use is not that contemplated by 43 CFR 2561.0-5(a). It further held there must be substantially continuous use and occupancy which must be at least potentially exclusive of others and not merely intermittent use.

Appellant argues that use of the land by others does not make her use nonexclusive. Since no other villagers claim exclusive use, she asserts the land is not in community use and that others use it only with her implied consent because it would not be deemed proper or courteous to refuse use if anyone were to ask. She asserts that her exclusive use is a recognized personal property right which has been passed down patrilineally from generation to generation. Appellant's affidavit, submitted with her statement of reasons, states in pertinent part as follows:

> 3. The statement that the BLM made about the entire community using Parcel B is not true. Various members of the community have gone on Parcel B from time to time to pick some berries, but they have done so with the knowledge that the rights to Parcel B are exclusively mine.
>
> 4. In the Eskimo culture, it is not very common for anybody to prevent friends and relatives from using their things, including land. Our culture is based on sharing resources, and it would be considered very rude to order people off our land. We are more concerned with living in harmony with the land and with each other than we are with showing how important we are by keeping others off our land when there is plenty there for everybody to use.

> 5. In Kiana, most people know where other people's allotments are located, and I believe that most people in Kiana know where my Parcel B is, and they only use it knowing that it is mine. That means they use it without doing anything to ruin it for me and my own use.
>
> 6. Most of the berry-picking areas around Kiana are used by many people, since there are plenty of berries and we use the spots that are convenient. There is no reason for anybody to keep others off the land to keep all the berries to themselves.
>
> 7. If I wanted to, I could tell everyone in the village not to go on Parcel B, and they would not go on it. But I don't want to have to do that. Parcel B is a good spot for berry-picking and I want to share it.

Appellant, on one hand, admits that parcel B is historically a berry picking area used by everyone in the village. On the other hand, she asserts that by the time she was almost 16 everyone recognized her sole ownership, that she impliedly allowed everyone to use the land, but had she wanted she could have prohibited them although no reason arose to do so.

As noted by appellant, there are plenty of berries and everyone uses the convenient berry picking patches. According to the evidence before us, no one excludes others from using the patches. It follows that intermittent berry picking on a patch used by others without additional showings of potentially exclusive use does not meet the regulatory requirements of substantially continuous use and occupancy. Appellant's claim of exclusivity by intermittent berry picking must be rejected. We are not persuaded to the contrary by the affidavit, dated January 13, 1971, by appellant, Eva Baldwin, and Roger Actvuk. Although they asserted therein, as did the BIA certification, that the land was staked, the field report of May 29, 1973, negates this assertion.

Appellant has not shown the type of possession which would characterize an owner's use, nor has she shown that her use of the land differs in any respect from the use of the same land by many others.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Frederick Fishman
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Anne Poindexter Lewis
Administrative Judge